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GUNNEFLO BOOK SYMPOSIUM SYMPOSIUM

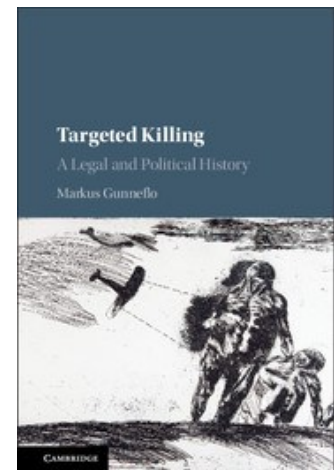
Gunneflo Book Symposium: Part 4

Karin Loevy: Law's Compulsion or Coming out of the Shadows

KARIN LOEVY — 29 March, 2017



On a clear November morning in 2000, Hussein Abayat, a senior official in the Fatah faction Tanzim, was killed by a hellfire anti-tank missile fired from an Israeli helicopter. When the incident was announced later that day, instead of the regular official denial of any direct involvement by Israel in the attack, the Israeli defense minister went on live radio, openly boasting that the IDF did it.



I was a first year law student and on my way to the university when I heard the announcement on the radio. I knew right there and then that something drastic changed in the legal politics of security in Israel: that was the moment when Israel's policy of 'targeted killing' (in Hebrew: *sikul memukad*) came out of the shadows of deniability. I also knew, intuitively, that it was somehow connected to a change in US policy. Without US support, I thought, there's no way that the Israeli defense minister would sound so confident in revealing what was until then a publicly known secret – that Israel is conducting assassination

campaigns against terrorist targets in the occupied territories. This practice was well known by all and well reported by human rights organizations during the 1980s and 1990s but no official representative would confirm it. What's more – no legal authority would dream of justifying it. It was – until that morning – a well known, well denied – illegal practice.

Since that day, and through the process that turned assassination campaigns to 'targeted killings' and to indispensable tools of counterinsurgency policy worldwide, I was asking myself how it happened. How did an illegal practice, one that everyone agreed should remain in the shameful shadows of illicit covert agencies, become in such a short time (in one day, as far as my life was concerned) a legal, open and widely justified practice. I was taunted by this question. How does such immense legal change happen so abruptly? And why do sensible lawyers so easily deny the fact of change, claiming that under the circumstances of 'a new type of war' there's nothing more natural in it and that it was, in fact 'always legal' under International Humanitarian Law (IHL). Was the change strictly political? As much as I thought about it, the question itself became more confusing. Even in my book, which deals with the dynamic legal politics of torture, detention, and other emergency and war practices, the politics of the sudden and overwhelming rise of targeted killing remained outside of grasp.

Not so much anymore. Markus Gunneflo's book, Targeted Killing: A Legal and Political History, helps unravel and clarify the chilling history of normalization of the shadowy practice of extrajudicial killing into the everyday life of public law. In a sweeping and thrilling monograph Gunneflo uses historical sources and analysis, sophisticated theoretical contextualization and legal debate to show that the practices we call today 'targeted killing' emerged through extensive legal work, that they were shaped by a variety of actors (lawyers, judges, executives, advisors, academics, military strategists and coders, and more), and that their emergence onto the law was a much longer process than we tend to think. Furthermore, Gunneflo finally brings home explicitly the much overdue story about the intimate connection between the evolution of targeted killing in the US and in Israel. In both countries, Gunneflo shows, targeted killing was

normalized not despite, or in opposition to law. In and between both jurisdictions, targeted killing emerged as a typical case of legal compulsion.

The history that Gunneflo tells is mesmerizing and painfully accurate. In the following note I'd like to push the theoretical analysis a bit further on what I see as the book's biggest contribution – using the contemporary notion of law's compulsion to bear not only on the legal politics of targeted killing but also on Weimar era ideas that this politics still echoes.

1.

As the book moves from the Israeli history of targeted killing to that of the US and to the current legal context in which debates about its justification predict its future, it elegantly contextualizes the thick description within thick theory.

The Israeli case study (Chapter 2) uses Walter Benjamin's distinction between law-making and law-preserving violence to flesh out the erasure of the distinction in the 2006 Israel Supreme Court decision which legalized targeted killing (p 59). The Israeli court was exercising a law making power by creating its own jurisdiction over the category of 'civilians who constitute unlawful combatants' – and by that also a law-preserving power: maintaining a way for Israeli preservation of monopoly over violence in the conflict with the Palestinians – a right to continually exercise the active self-defense measure of targeted killing. Though the case is illustrative, it is not new: since Israel is constantly, and from its very beginning, under a legally declared state of emergency – the Israel Supreme Court developed its political significance in the Israeli constitutional order as the legitimate superior legal decider by managing the constant threats and possibilities that the never ending state of emergency brought forth. The Court is complicit because the continuous emergency left space for law-making violence to be the mode of constant preservation. In a constant state of emergency, as soon as a jurisdiction is created by an act of law-making violence (military rule, the law of occupation), it is already under attack and in need of preservation.

Interestingly, Benjamin is brought to the Israeli story also for his

personal biography. In a 1931 letter to his Zionist friend in Palestine, Gershom Scholem, he seems to contrast political options in Europe and in Palestine. Arab-Jewish cooperation in Palestine, he suggests, after hearing about Scholem's participation in the Arab-Jewish group 'Brit Shalom', shows that there are other opportunities for 'unambiguously differentiating yourself from the bourgeoisie there [in Palestine] than there are here [in Europe]' (quoted on p 33). In that Benjamin might have been overly optimistic. As the history of targeted killing that Gunneflo uncovers in the Israeli story clearly shows – such opportunities were quite easily erased by the emergence and institutionalization of law-making and law-preserving violence that were as endemic to the Jewish nation-building experience as they were in Europe.

2.

The American case study (Chapter 3) starts with the story of the US citizen Anwar al-Awalaki who was targeted and killed in Yemen in 2011 less than a year after a US federal court dismissed his father's plea for his son's life for lack of jurisdiction. With the court's lethal non-justiciability in mind, the chapter moves to analyze a number of Carl Schmitt's texts on domestic and international law and politics, culminating in a quote that indicates that Schmitt himself was aware of the compulsion of legality: 'Even the legality that is challenged in the modern state is stronger than any other type of right. That is a manifestation of the decisionistic power of the state and its transformation of right into law. . . legality is the irresistible functional mode of every modern state army' (108).

From here, the move back to the American war on terror is telling. In Gunneflo's story, this war was first declared in April 1984 by means of Ronald Regan's National Security Directive No. 138 that together with George Schultz' address from the same day constituted a declaration of war against 'an unspecified foe to be fought at an unknown place and time with weapons yet to be chosen' (109). But while the Schultsian agenda of the 1980s – which projected an image of a globalized Hobbesian world mixed with a Schmittian 'threat to our way of life' – was understood at the time as anomalous and failed, Gunneflo shows how it was normalized and even radicalized in the post 9/11 era

both in US domestic and in international law.

3.

Although Weimar era theorists prove useful for the analysis, in order to truly understand the meaning of the move from the failed political agenda of the 1980s (promoting a global war against all enemies to 'our way of life') to its successful legal realization in post 9/11 world order, Gunneflo makes use of contemporary theorists of law and legality. In the writing of Ernst-Wolfgang Böckenförde and David Dyzenhaus, Schmitt's dualistic theory of extra constitutional exception is domesticated within German constitutional law and common law respectively, and in legalism more broadly.

In a rule of law state, Dyzenhaus tells us, law has a particularly strong pull over officials' decision making. If they are to do their job as public officials of a rule of law state, they cannot 'act outside the law'. When they feel the urge to do so, as sometimes happens in situations of pressure and crisis, they will tend to veil their illegality under a 'thin' layer of legality (233). It is not 'the exception' that makes them corrupt law. It is the compulsion of law itself. It is not pure politics that overcomes law. It is the politics of law itself.

In a similar vein, Böckenförde unpacks Schmitt's dualism by showing that the constitution is a genuinely political law. 'It deals with politics not only directly and incidentally but immediately addresses the existence, form and action of the political unity.' (236) The constitution's telos – Böckenförde claims – is to facilitate, preserve and support the state as a political unity, and to deal with politics in the immediate sense of addressing the existence, form and action of the political unity' (ibid.). In that, Gunneflo rightly observes, it is a very different constitution than the one criticized by Schmitt in his 1922 *Political Theology* as 'a mechanism that has become torpid by repetition' (ibid.)

In both Dyzenhaus' legalism and Böckenförde's constitutionalism the political project of law is an urgent matter, as urgent and crucial as Schmitt's political decision has ever been. But in a rule of law state this urgency is never 'outside the law', it is internal to the politics of law – the politics of making law (or the constitution in Böckenförde's case) a

reality in every moment of national life.

This is indeed well placed as the culmination of the theoretical analysis of the historical move to normalize ‘targeted killing’. In a rule of law state, law triggers a constant compulsion to realize official acts as legal. But the compulsion has more than one trajectory, or in Dyzenhaus’ terms, more than one cycle. Other cycles of legality open up when institutions cooperate in creating ‘rule of law furniture’, institutional controls on public authorities that ensure that their conduct is compatible with a substantive principle of legality. While Dyzenhaus himself estimated in 2006 that targeted killing is, like torture, not only illegal but ‘unlegalizable’ – the reality of 2017 illustrates the urgency of the imperative for international law to develop institutional capabilities to constrain the compulsion to create, by legal veneers, zones of vulnerability to arbitrary killing.

Karin Loevy is the manager of the JSD Program at NYU School of Law and a scholar at the Institute for International Law and Justice (IILJ). Her book, *Emergencies in Public Law: The Legal Politics of Containment*, was published by Cambridge University Press in 2016. An overview of her new project on *history of international law in the Middle East (1915-1922)*, was recently published in the *Israel Law Review* and won the journal’s prize for best unsolicited article for 2016.

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